O/A 6-20-88

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CLARK A. CAPLAN,

Appellant,

Vs.

STATE OF FLORIDA,

Appellee.

CASE NO.: 71,709

APPELLANT'S BRIEF ON THE MERITS

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STATEMENT OF THE FACTS AND THE CASE

On September 26, 1985, at about 1:00 p.m., the Appellant was involved in an automobile accident directly in front of the Hollywood, Florida police station (R.5-6). Hollywood police officer Marvin Roberts happened to be walking out of the station just after the accident occurred and he approached the scene to determine whether anyone was injured (R.7). There were no injuries (R.7). Roberts saw the Appellant get out of his automobile (R.7) and asked him to produce a driver's license and registration (R.8). At that time it was determined that the Appellant's vehicle was incapable of leaving the scene under its own power and would have to be towed away (R.8). The Appellant showed no signs of intoxication and did not have an odor of an alcoholic beverage on his breath (R.18). Roberts had a discussion with the Appellant about having the car towed away during which Roberts advised Appellant that a wrecker service called Mac's Towing Service was used by the police, and the Appellant asked Roberts if he, Roberts, would call the towing company for the Appellant in order to have the car towed (R.23-24). In the meantime, the Appellant entered the police station in order to use a telephone (R.8).

The towing service suggested by Roberts is an independent company which does not work for the police department (R.23). The car was not being taken into police custody and was not going to be towed to a police impoundment lot (R.24). Roberts never advised the Appellant that his automobile would be

impounded by the police, that the contents of the car would be inventoried, or that anyone would search the car (R.23-25). Further, Roberts never asked for Appellant's permission to enter the car (R.23).

After the Appellant went to make his phone call, Roberts was preparing a tow slip. In so doing he looked inside the Appellant's car (R.11). He saw what he described as "several small rolled burnt cigarette wrappings..." (R.11). Roberts, at that time, did not know what was inside the cigarette wrappings (R.26, 28). He could not see the contents of the wrappings (R.27). He saw no marijuana residue anywhere around or in the car (R.26). He did not smell the odor of marijuana at that time (R.30).

Roberts, thereupon, opened the door of the Appellant's vehicle (R.13). He conducted a search of the vehicle including the glove box and the back seat which revealed the presence of contraband (R.13-14). Roberts then sent another police officer to arrest the Appellant (R.16).

The Appellant, as a result of his arrest, was charged with two counts of possession of narcotics (R.68). The Appellant filed a Motion to Suppress the contraband which was seized from his car (R.70-73). The lower court, after an evidentiary hearing, entered a written Order denying the Motion to Suppress (R.78-79). The Appellant, thereafter, entered a plea of nolo contendre to the charges, specifically reserving his right to appeal the denial of his Motion to Suppress Evidence (R.52). Both the State (R.49, 52) and the Court agreed that the Motion

to Suppress, if granted, would have been dispositive of the case (R.64). The Appellant was sentenced to a term of probation (R.75-77).

The Appellant filed an appeal in the Fourth District Court of Appeals. The District Court, in a 2-1 decision affirmed the trial Court. Thereafter, the District Court granted the Appellant's Motion for Rehearing and filed a revised opinion which again affirmed the trial Court in a split decision.

This Court, on March 18, 1988, accepted jurisdiction of this matter.

SUMMARY OF ARGUMENT

A police officer, while investigating a routine traffic accident, saw some hand-rolled cigarette papers on the floorboard of a car. Although he could not see what was inside the wrappings, he believed that they contained marijuana. There was no other evidence that the automobile might contain contraband. Based upon this observation, the police officer did not have probable cause to enter the automobile and conduct a search.

The District Court also justified the seizure as being conducted pursuant to a valid inventory search. However, the vehicle was never in police custody. An inventory search serves the purpose of protecting the owner's property as well as the police from false claims of theft or damage. There was, therefore, no valid reason for the police to conduct an inventory search. The Appellant merely asked the officer to help him get a tow truck to the scene to tow his car away. That does not give any custodial liability to the police officer. Furthermore, the police never advised the Appellant of alternatives to an inventory search as required.

ARGUMENT - I

MERE OBSERVATION OF HAND-ROLLED CIGARETTES IN AN AUTOMOBILE IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE TO SEARCH THE VEHICLE.

The U.S. Const., Amend. IV and Art. I, §12, Fla. Const. protect citizens against unreasonable searches and seizures and require government agents to obtain a warrant, to be issued only upon the showing of probable cause, prior to conducting a search or seizure. A recognized exception to this warrant requirement is the "plain view" doctrine. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); State v. Ashby, 2454 So.2d 225 (Fla. 1971). In the instant case, the trial Court ruled that the observation of burnt cigarette ends by a police officer looking inside an automobile through the windshield was sufficient to permit a search of the vehicle under the plain view doctrine (R.78). The majority opinion of the Fourth District Court of Appeal under review here affirmed that decision. The sole question is whether what the officer saw was sufficient to establish probable cause to permit him to search the vehicle under the plain view doctrine.

One line of cases in Florida has held, basically, that observation of an oblique container frequently used to hold contraband may be sufficient to establish probable cause to search the container even though its contents cannot be seen. Adams v. State, 375 So.2d 638 (Fla. 1st DCA, 1979); Lachs v. State, 366 So.2d 1223 (Fla. 4th DCA, 1979); Tamburro v. State,

343 So.2d 638 (Fla. 4th DCA, 1977); State v. Redding, 362 So.2d 170 (Fla. 2d DCA, 1978); Albo v. State, 379 So.2d 648 (Fla. 1980).

However, another line of Florida cases has held, basically, that observation of an oblique container, without more, is not sufficient to establish probable cause to search the container even though a police officer suspects it contains contraband. Chappell v. State, 457 So.2d 1133 (Fla. 1st DCA, 1980); Carr v. State, 353 So.2d 958 (Fla. 2d DCA, 1978); Taylor v. State, 381 So.2d 255 (Fla. 5th DCA, 1980); Harris v. State, 352 So.2d 1269 (Fla. 2d DCA, 1977); Thompson v. State, 405 So.2d 501 (Fla. 2d DCA, 1981).

This Court recently took the opportunity to analyze and review these two seemingly divergent lines of cases in P.L.R. v. State, 455 So.2d 363 (Fla. 1984). Rather than adopting one line or the other, this Court harmonized them by distinguishing and delineating the factual bases in each case. This Court stated that the totality of circumstances is the standard to determine probable cause and that among the most important circumstance was the location where the container was observed:

> "...we distinguish rather than disapprove Thompson, Carr, and Harris, primarily on the basis that there was no evidence that the searches and seizures in those cases occurred at narcotics-transaction sites where the type of container seized was utilized as a principal means to convey narcotics." (at 366).

In other words, the following factors may combine to establish probable cause: 1) a container commonly used to hold narcotics,

2) the observation of that container at a known narcotics transaction site and 3) the police officer's experience and knowledge of narcotics type transactions.

In the case currently under review, the Appellant was involved in an automobile accident in front of a police station. The investigating police officer happened to look into the Appellant's vehicle through the windshield and saw two hand-rolled, partially burnt cigarettes on the floorboard. He could not see what was inside them. The opinion of the lower Court states that the officer saw "marijuana" cigarettes. While it is true that post-seizure analysis determined the contents to be marijuana, it is also true that the police officer's belief of what the wrappings contained before he opened the car door to conduct a search was based solely upon his observation of the wrappings. The dissenting opinion quotes at length from the officer's testimony at the suppression hearing and it is clear from that testimony that the officer could not tell what was inside the wrapping and that it could well have been tobacco. Furthermore, the trial Court made a finding of fact which was only that the police officer saw "burnt cigarette ends" and specifically ruled that observation of the "burnt cigarette ends" gave the officer probable cause to search the vehicle (R.78). Finally, even the majority opinion under review concludes that the items seen by the police officer were consistent with being legal tobacco cigarettes.

The question, then, is which type of fact pattern this case more closely resembles. Other than the police officer's

testimony that the cigarette wrappings he observed were frequently used to hold marijuana, there were absolutely no other indicia of criminal activity. The officer did not observe any other item of possible contraband inside the vehicle such as marijuana seeds or residue or paraphernalia associated with the use of marijuana. The officer did not observe any suspicious activity or behavior. The Appellant did not appear intoxicated. The location of this accident was not in a known narcotics transaction site.

In fact, the material facts in the instant case are nearly identical to those in Carr v. State, supra. There, a police officer looked into a vehicle and saw two hand-rolled cigarettes. He was unable to see what was inside them but testified he knew they contained marijuana because of the way they looked. The Court held that this was insufficient to justify a search under the plain view doctrine. This case is the same.

Under the harmonizing doctrine of P.L.R. v. State, supra., Officer Roberts simply had no probable cause to search the Appellant's vehicle because he did not observe any contraband therein and because the surrounding circumstances failed to sufficiently enhance his suspicions. In short, the Officer observed paper that could have contained marijuana, tobacco, air, or an infinite number of other things. Without more, his mere suspicion cannot rise to the level of probable cause.

The trial Court should have ruled that the search was unreasonable. All evidence seized should have been suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d

441 (1963). This issue was properly preserved for appellate review as the outcome of the motion to suppress was admittedly dispositive of the case (R.49, 52, 64). Brown v. State, 376 So.2d 382 (Fla. 1979).

II

THE LOWER COURTS ERRED IN HOLDING THAT AN INVENTORY SEARCH OF AN AUTOMOBILE WHICH WAS INVOLVED IN A TRAFFIC ACCIDENT AND WHICH WAS NEITHER IMPOUNDED NOR IN POLICE CUSTODY WAS LEGALLY PERMISSABLE.

A) REASON FOR SEARCH

It should be initially noted that the reason the police officer searched the vehicle was because of his belief that he had probable cause to do so (R.29). At the hearing on the Motion to Suppress, the officer testified that upon seeing the burnt cigarette wrappings

> "I immediately continued my investigation of the traffic accident and at that time, focused more on a criminal investigation also. I opened the door to the vehicle." (R.13).
>
> .
> .
> .
>
> "Q. ...you thought you had probable cause to go into the car and conduct a further investigation.
> A. Yes, I did." (R.29).

A valid inventory search, by definition, must not contemplate a criminal investigation. U.S. v. Prescott, 599 F.2d 103 (5th Cir., 1979).

There is no evidence in the record that the officer conducted the search for any reason other than a criminal investigation. He certainly never contended the search was conducted as an inventory search. The issue of the search being conducted pursuant to a valid police inventory was a creation of the

lawyers and the trial judge. The Appellant does not argue that the inventory search was only a pretext. The Officer never contended that the search was anything other than a criminal investigation based upon his observation of what he believed probably contained contraband. Thus, there was no pretext. Rather, the Appellant contends that the entire inventory analysis was merely an attempt by the State and the trial judge to legally justify this search. This Court should hold that no inventory search occurred, and the validity of the search should be solely determined on the issue of probable cause.

B) **INVENTORY SEARCH**

The issue of an inventory search, seeming to have taken on a life of its own independent of the facts, is, basically, a question of whether the Appellant's automobile was subject to such a search. The Appellant contends that since the vehicle was not impounded or otherwise in the lawful custody of the police, an inventory search was not legally permissable.

In South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), the United States Supreme Court recognized yet another exception to the warrant requirement of the Fourth Amendment. It held that the police may conduct an "inventory" search of an automobile which is legally in the custody of the police. There, the police had impounded a vehicle, pursuant to local law, for parking violations. The Court reasoned that the need to conduct such searches of impounded vehicles arises from three considerations: 1) protection of

the owner's property, 2) protection of the police from claims of lost or stolen property from the vehicle and, 3) protection of police from hidden danger.

Florida recognized the propriety of the inventory search as a legitimate exception to the warrant requirement in Miller v. State, 403 So.2d 1307 (1981). In doing so, this Court stated in part:

> "...we hold [that] the purpose of an inventory search is a caretaking function exclusively for (a) protection of the owner's property, (b) protection of the police from claims and disputes over lost or stolen property which has been impounded and (c) protection of the police from danger..." (at 1309)

It would seem clear, then, from the reasoning of the Supreme Court of the United States and the Supreme Court of Florida that the one prerequisite necessary to justify an inventory search of an automobile is that the vehicle must be in police custody. Otherwise, there would be no need to perform a caretaking function. See e.g. Altman v. State, 335 So.2d 626 (Fla. 2d DCA, 1976).

In the instant case, the Appellant was involved in an automobile accident which required that his vehicle be towed from the scene. He discussed with the police officer the availability of towing services (R.23). The officer told him of the towing company the city used on a rotation system and Mr. Caplan asked the officer if he would call that service for

him (R.23). The officer had no intention of impounding the vehicle and the State even argued below that no impoundment had occurred. The officer testified as follows:

> "Q. Let me get this straight. Mac's Towing doesn't work for the police department, they are an independent contractor?
>
> A. That is true.
>
> Q. And the city has a contract with this particular towing agency to tow away the cars?
>
> A. Yes.
>
> Q. The police weren't taking custody of Mr. Caplan's vehicle, it was Mac's Towing Service that was going to be charged with the responsibility of taking it and towing it away?
>
> A. From the point of the accident, yes.
>
> Q. It wasn't going into any police lot or impoundment lot or anything of that nature?
>
> A. No." (R.23-24).

After making sure that a tow truck had been summoned, Mr. Caplan went inside the police station to call someone to pick him up. While he was doing so, the police officer entered his car and searched it.

The burden is on the State to justify the necessity of an inventory search by showing that an impoundment was reasonable. McClendon v. State, 476 So.2d 1303 (Fla. 2d DCA, 1985). In the instant case, the vehicle was never in the custody of the police. It was not to be impounded and was not to be towed to a police lot. The owner or possessor was on the scene and able to make decisions about the disposition of his car. In fact, he decided

which tow company to call. After discussing it with the Officer, Mr. Caplan made the decision to have Mac's Towing pick up the car. It is obvious that Caplan could have called Mac's himself. Under the rationale of Opperman and Miller, the State simply did not carry its burden to show why an inventory search would be justified under these circumstances.

There has been discussion about the inventory search being conducted pursuant to standard police operating procedures. However, that analysis has been used by Courts only as an aid in determining whether the inventory search was conducted as a pretext to an underlying criminal investigation. U.S. v. Laing, 708 F.2d 1568 (11th Cir., 1983); South Dakota v. Opperman, supra. Here, there is no argument that an inventory search was conducted only as a pretext. The Officer claimed that he conducted the search because of his belief that he had probable cause. Thus, the standard operating procedure analysis is not applicable to these facts.

The effect of the lower Court's ruling is far reaching. Whenever an unwitting motorist is involved in a traffic accident and requests the investigating police officer to assist in obtaining a wrecker service, he may be opening the door to having his personal belongings searched. An unfortunate driver whose car breaks down on a lonely, deserted stretch of highway (much of the Florida Turnpike comes to mind) would be confronted with an unpalatable choice: walk to a phone or ask assistance from a police officer in obtaining a tow truck. The latter choice would give the police the right to conduct an inventory

search. This scenario simply cannot be a legitimate outgrowth of the Opperman and Miller decisions. The Fourth Amendment is there to protect citizens from unwarranted and unreasonable government intrusions into their privacy. Extending the scope of inventory searches to include everyone involved in a traffic accident whose car needs towing and who, with trust, ask the police for help does not serve that purpose.

C) **ALTERNATIVES TO IMPOUNDMENT**

In Miller v. State, supra., this Court fashioned a rule deciding that the owner or possessor of an automobile, if available, must be consulted before his car is impounded to determine if a reasonable alternative can be arranged. Thus, if a person is arrested while driving his car, impoundment does not automatically follow. He must be given the opportunity to make alternate arrangements for its disposition. Specifically, the Court stated:

> "What we hold is that an officer, when arresting a present owner or possessor of a motor vehicle, must advise him or her that the vehicle will be impounded unless the owner or possessor can provide a reasonable alternative to impoundment" (at 1314).

The Courts of this State have consistently required adherance to this rule. Higgins v. State, 422 So.2d 81 (Fla. 2d DCA, 1982); McClendon v. State, supra. Exclusion of evidence seized as a result of searches conducted in violation thereof has been utilized by the Courts as proper.

The police officer admittedly did not discuss with Mr. Caplan his intent to search the car. He never discussed the fact that Mr. Caplan's car might be inventoried if he used Mac's Towing Service and never discussed alternatives thereto (R.25). Furthermore, Mr. Caplan was fully able to make decisions on the scene about his automobile unlike drivers in some cases cited in the District Court opinions who were unconscious following automobile accidents. State v. Floyd, 586 P.2d 203 (Ariz. App., 1978); Robertson v. State, 541 SW 2d 608 (Tex. App., 1976). It should be clear that failure to follow the dictates of Miller, supra., should have resulted in the Motion to Suppress being granted.[1]

The Fourth District opinion, however, completely fails to discuss this issue. It implies that when no impoundment occurs, Miller does not apply. Indeed, the argument asserted by the State below was that the car was not impounded, the inventory search was conducted to protect the valuables in the car, and since there was no impoundment, the officer had no obligation to discuss alternatives with the Appellant. Somewhere in there the Fourth Amendment has mysteriously disappeared. This

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[1]The continued applicability of Miller has been upheld against an attack that it was superceded by the 1983 amendment to Art. I, §12 Fla. Const., State v. Small, 483 So.2d 783 (3rd DCA, 1985). But see State v. Williams, 516 So.2d 1081 (2nd DCA, 1987) which cites Colorado v. Bertine, ___U.S.___, 107 S.Ct. 738, 93 L.Ed. 2d 739 (1987) for the proposition that alternatives to impoundment as a judicial creation are not required by the 4th Amendment. Bertine, however, (decided over a year after the events in this case) held only that judicial hindsight was not a substitute for 4th Amendment requirements. Here, the Miller requirements for alternatives to impoundment were in existence for several years before this case.

legalistic slight of hand would mean that someone arrested for a crime would have more rights regarding the disposition of his property than would an innocent citizen, minding his own business, who is rear ended by a careless motorist. This reasoning completely distorts the rationale behind permitting inventory searches in the first place.

Inventory searches, as previously discussed, are permitted to protect the property of the individual and to protect the police from claims of lost or stolen property. They are permitted only when a vehicle is impounded, seized for forfeiture or evidence or, otherwise lawfully in police custody. If Mr. Caplan's car was not in police custody, there was no reason to conduct an inventory search; but, if it was in police custody, then the rule of Miller, supra. regarding alternatives should be just as viable and just as applicable (if not more so) as when a vehicle is impounded due to the driver's arrest. A person involved in a traffic accident, which would require the towing away of his vehicle, has enough to worry about without also having to be concerned about falling prey to a tortured rule of law which would give police the right to search his car if he should, heaven forbid, ask the police to help him call a tow company.

Since the Appellant was never advised that requesting the police to call Mac's Towing would result in his car being searched, and alternatives in the disposition of his car were not discussed, the search, if justified as an inventory, should have been ruled unreasonable and the items seized should have been suppressed.

CONCLUSION

When a police officer sees an object that, in his experience, he knows frequently contains contraband, he does not automatically have probable cause to search the container. There must be other evidence indicating a probability that contraband will be found. Such evidence would include the location being a known narcotics transaction site. In this case, the police officer had no evidence other than his mere observation of hand-rolled cigarettes that contraband was contained inside the Appellant's vehicle. Thus, he had no probable cause to enter the vehicle and conduct a search. The trial Court and the District Court of Appeal were in error in holding to the contrary.

When an individual is involved in a traffic accident and his car needs to be towed away, requesting assistance in obtaining a wrecker service from the investigating police officer does not give that officer the right to conduct an inventory search. The purpose of an inventory search is to protect the owner's property and the police from false claims of theft. When the owner is available to make decisions as to the disposition of his vehicle, those purposes are not served and an inventory is totally unnecessary. The trial Court and the District Court of Appeal were in error in ruling to the contrary.

The decision of the District Court of Appeal should be reversed and this cause should be remanded to the trial Court

with instructions to grant the Motion to Suppress.

Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct coy of the foregoing was mailed this the 12th day of April, 1988, to: THE OFFICE OF THE ATTORNEY GENERAL, 111 Georgia Avenue, Room #204, West Palm Beach, Florida, 33401.

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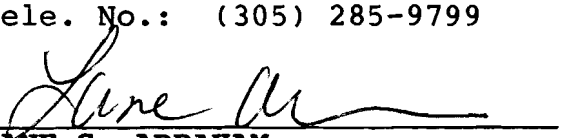

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